

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MSOFFE, J.A., MANDIA, J.A., And ORIYO, J.A.)**

**CIVIL APPEAL NO. 26 OF 2009**

**MURTAZA MOHAMED RAZA VIRANI ..... APPELLANT**

**VERSUS**

**MEHBOOB HASSANALI VERSI ..... RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam**

**(Kimaro, J.)**

**dated 4<sup>th</sup> day of September, 2003**

**in**

**Commercial Case No. 281 of 2002**

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**RULING OF THE COURT**

9 & 25 February, 2011

**ORIYO, J.A.:**

This is an appeal arising from a preliminary decree or order of the trial High Court where the appellant, had, in his Written Statement of Defence, made an admission to part of the claim in the plaint. The court entered judgment on admission on 4<sup>th</sup> September 2003. Aggrieved, the appellant preferred the appeal using the services of Mr. Sylvester Shayo, learned advocate.

By a Notice of Preliminary Objection made under Rule 107(1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") lodged on 4<sup>th</sup> February 2011, Mr. Eustace Rwebangira, learned advocate for the respondent sought orders of the Court to strike out the appeal with costs for incompetency. The grounds of objection were as follows:-

- (a) That the record of appeal is incompetent as it lacks a copy of the Order appealed against dated 4/9/2003, which is contrary to Rule 89(1) (g) of the Rules, 1979.
- (b) That some of the grounds of appeal are based on an earlier decision of the High Court dated 24/7/2003, for which there was no Notice of Appeal filed against it.
- (c) That the record of appeal is incompetent in the absence of a Ruling dated 24/7/2003 allegedly contained at pages 70 – 76 of the record which pages are missing.

In the course of addressing us on the above points of objection Mr. Rwebangira raised an interesting point that the record of appeal correctly contained a Decree extracted from the order of the trial court which led to the judgment on admission on September 2003. He went further to argue that the record should have also contained a Drawn Order extracted alongside the Decree. On being prompted by the Court on the status of the Decree on record extracted from the trial court decision of 4 September 2003 and dated 27 December, 2006, the learned advocate submitted that the decree is defective in that respect. He stated that the record of appeal is incompetent for containing a decree whose date is different from the date of the decision being appealed against, contrary to Order XX Rule 7 of the Civil Procedure Act, Cap 33, R.E. 2002.

Mr. Shayo, learned advocate, was at first taken by surprise but subsequently, he easily conceded to the reality that the decree which was in the record of appeal did not comply with the provisions of Order XX rule 7 of the Civil Procedure Code.

On our part, we had no difficulty in dealing with the last issue on the decree as consented to by parties. As stated earlier on, the appeal is

sought against the decision pronounced by the trial Court on the 4<sup>th</sup> September 2003, but the decree was signed by the trial judge on 27<sup>th</sup> December, 2006. The dating and the signing of the decree is couched in the following words:-

“Judgment on admission entered against the first Defendant for the amount of US \$ 85,000:

Given under my hand and the seal of the Court this **27<sup>th</sup> day of December, 2006.**”

Obviously the date of signing the decree differs with the date the decision of the court was given.

Order XX rule 7 reads as follows:-

*“ The decree shall bear the date on which the judgment was pronounced and when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree.”*

We wish to observe here that the contents of a record of appeal are spelt out under rule 89(1) of the rules, 1979 (now rule 96(1) of the Rules, 2009). The sub-rule provides as follows:-

*" 89-(1) For the purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall, subject to the provisions of subrule (3), contain copies of the following documents-*

- (a) an index of all the documents in the record with the numbers of the pages at which they appear;*
- (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by Rule 79, his last known address and proof of service on him of the notice of appeal;*

- (c) the pleadings;*
- (d) the trial Judge's notes of the hearing;*
- (e) the transcript of any shorthand notes taken at the trial;*
- (f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, their certified translations;*
- (g) the judgment or order;*
- (h) the decree or order;*
- (i) the order, if any giving leave to appeal;*
- (j) the notice of appeal;*
- (k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant save that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any of their parts that are not*

*relevant to the matters in controversy on the appeal.”*

It is evident from rule 89(1) (h) above that one of the essential documents to be contained in a record of appeal is a copy of the decree or order appealed from. It is now settled that non- incorporation of a copy of decree or incorporation of a defective decree renders the appeal incompetent.

For instance, some of the previous decisions of this Court on the issue of defective decrees can be found in the cases of :-

**Haruna Mpangaos and 902 Others Vs Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 10 of 2007; **Kapinga and Company Advocates Vs NBC Ltd**, Civil Appeal No 42 of 2007; **Mkama Pastory Vs T.R.A**, Civil Appeal No. 95 of 2006; **Zanzibar Insurance Corporation Vs Paul Mwita Chacha**, Civil Appeal No 83 of 2006; (all unreported).

We are therefore, firmly of the view that a decree which does not bear the date when the judgment was pronounced is not valid. It follows that the appeal to this Court which does not contain a correctly dated decree will not have complied with the requirements of Rule 89 (1) (h) of the Court Rules, (supra). In the present appeal there is no dispute that the decree in the record of appeal filed on 15/4/2009 is defective and therefore invalid.

In the case of **Fortunatus Masha Vs William Shija and Another [1997] TLR 41**, objection was taken that the record of appeal did not contain the drawn or extracted order which is contrary to Rule 89(1) (h) of the Rules. The respondent conceded to the non-compliance with the rule but contended that the omission did not render the appeal incompetent. To this, the Court had the following to say:-

*“The law as it now stands is that failure to extract the decree or order in terms of Rule 89 (1) (h) and (2) (v) of the Court of Appeal Rules renders the appeal incompetent.”*



Apart from that the Court expressed the view that there is no difference between extracting an invalid decree as was the case in the present appeal and failure to extract a valid decree as in **Masha's case**. In all such cases the appeal is incompetent and the remedy is to strike it out.

Accordingly we strike out the appeal. In the absence of a competent appeal before us, the respondent's Notice of Preliminary Objection is rendered redundant. Since the defect in dating the decree which led to the striking out of the appeal was prompted by the Court, we make no order as to costs.

We so order.

DATED at DAR ES SALAAM this 22<sup>nd</sup> day of February, 2011.

J. H. MSOFFE  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**